1-9-1976

Betty Jo Garrison v. Dr. Horace W. Addams

Appellant's Brief 1975-SC-1035

APPELLANT'S BRIEF

3781

SUPREME COURT OF KENTUCKY

No. 75-1035

BETTY JO GARRISON - - - - Appellant

versus

DR. HORACE W. ADDAMS Appellee

APPEAL FROM JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, SECOND DIVISION
HONORABLE HENRY D. HOPSON

BRIEF OF APPELLANT

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This is to certify that copies of this Brief have been mailed to Mr. John T. Ballantine, 1200 Riverfront Plaza, Louisville Kentucky, Counsel for Dr. Horace W. Addams and to the Honorable Henry D. Hopson, Trial Judge, Jefferson County Courthouse, Louisville, Kentucky, this the 7 day of January, 1976.

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STATEMENT OF QUESTION PRESENTED

Whether the Trial Court erred in granting the defendant's motion for Judgment Notwithstanding the Verdict and thus stripping Betty Jo Garrison of her award and judgment thereon.

SUPREME COURT OF KENTUCKY

No. 75-1035

BETTY JO GARRISON - - - - *Appellant*

v.

DR. HORACE W. ADDAMS - - - - *Appellee*

APPEAL FROM JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, SECOND DIVISION
HONORABLE HENRY D. HOPSON

BRIEF FOR APPELLANT

May it please the Court:

STATEMENT OF THE CASE

This is an appeal from a final judgment entered on July 15, 1975, wherein the trial court:

a) overruled Ronald Garrison's Motion for a New Trial—said motion being based upon inadequate damages awarded him, and

b) sustained Dr. Addams' (Appellee's) Motion for a Judgment Notwithstanding the Verdict, thereby dismissing Appellant's claims, verdicts and judgments against him.

This law suit arose out of an automatic collision which occurred on Dixie Highway in Louisville, Jeffer-

son County, Kentucky, January 10, 1971. Ishmael Cornett, alone in his automobile, driving south on Dixie Highway, crossed the median and went into the northbound lanes. Ronald Garrison was operating an automobile in the extreme right hand lane for northbound traffic on Dixie Highway, and Betty Jo was his only passenger. As a result of Cornett going across the median and into the northbound lanes, a collision occurred between his car and the Garrisons. A Deputy Coroner went to the scene of the accident and there pronounced Cornett dead. There was no evidence of speed or drinking, nor was there any evidence of a mechanical failure, or anything else, to explain why Cornett lost control of his automobile *until* Ronald Garrison was initially interviewed and related the physical condition that he saw Cornett a minute or so after the impact.

Suit was filed in behalf of Ronald Garrison against Sidney Hanish, Administrator of the estate of Ishmael Cornett and two significant pre-trial depositions were taken. Mrs. Cornett's deposition was taken wherein she revealed that her husband enjoyed good health except he had a "sleeping problem" and that Dr. Horace Addams had been his physician for many years. Dr. Addams' deposition was taken, at which time he made available for xeroxing, his entire office record. An analysis of Dr. Addams' office record and his deposition led to Ronald Garrison amending his complaint and naming Dr. Addams as a co-defendant. Betty Jo Garrison, having settled her case with State Mutual Insurance Company for its policy limit of $10,000.00

(State Farm insured Cornett) and reserving her rights to proceed against Dr. Addams and others, joined the litigation presenting her claims solely against Dr. Addams.

The case was tried between the dates of May 13th and 16th, 1975. At the close of all of the evidence, the trial court directed a verdict saying that Cornett was negligent as a matter of law and gave instructions to the jury relative to the cases against Dr. Addams.

The jury returned a verdict in favor of the Appellant, Ronald Garrison, against both Sidney Hanish, Administrator of the estate of Ishmael Cornett and Dr. Horace Addams, and each of them, jointly and severally, in the sum of ONE THOUSAND TWO HUNDRED FIFTY FOUR DOLLARS and SEVENTY SEVEN CENTS ($1,254.77) of which $454.77 was reimbursement for medical expenses and $800.00 was for injury, pain and suffering and permanent damage. The jury returned a unanimous verdict in favor of the Appellant, Betty Jo Garrison, solely against the Appellee, Dr. Horace Addams, in the sum of ONE HUNDRED FORTY ONE THOUSAND SEVEN HUNDRED NINETY FIVE DOLLARS ($141,795.00).

It is the contention of the Appellant, Betty Jo Garrison, that the trial court erred in sustaining the Motion of the Appellee, Dr. Addams for a Judgment Notwithstanding the Verdict.

Following the trial court's Order of July 15, 1975 (T.R., p. 58—overruling Ronald Garrison's Motion for a New Trial on inadequacy) and (T.R., p. 69—Dr.

Addams' Motion for Judgment Notwithstanding the Verdict), the Appellants, in due time, gave Notice of Appeal, promptly filed their Designation of Content of Record on Appeal and the appeal is now properly before this Court.

Susbsequent to filing the transcripts of Record and Evidence with the Court, and shortly prior to the printing of this Brief, Ronald Garrison's case was settled. Therefore, the only remaining matters are those pertaining to the appellant, Betty Jo Garrison.

STATEMENT OF FACTS

The Appellant, plaintiff below, hereinafter will be referred to as Betty Jo. Appellee, Sidney Hanish, Administrator of the estate of Ishmael Cornett, will hereinafter be referred to as Cornett. Appellee, Dr. Horace Addams, will hereinafter be referred to as Dr. Addams.

When the automobile accident giving rise to this litigation occurred, January 10, 1971, Ron and Betty Jo were both 18 years of age. Ron was a student at the University of Kentucky in Lexington, Kentucky and Betty Jo was employed as a receptionist for a local optometrist. They were engaged and plans had been made for a wedding in August of 1971. Both enjoyed excellent health. Ron and Betty Jo had spent the evening with friends over at Rev. Hicks' home and had borrowed Rev. Hicks' car in order to drive Betty Jo home. They were on the way to Betty Jo's house, driving in the curb lane, going north on Dixie Highway, shortly after midnight, when Ishmael Cornett,

alone in his automobile, driving south on Dixie Highway, suddenly came across the median dividing the highway and into the lane occupied by Ron and Betty Jo. A collision ensued, Cornett died, Ron received some serious, painful and permanent injuries, and Betty Jo received catastrophic injuries. Betty Jo's life has been forever changed as a result of severe and permanent brain damage which has resulted in a permanent paralysis of her face, right arm and hand, and a permanently crushed larynx which, despite more than a dozen operations, has resulted in a permanent and severe partial loss of her ability to speak. Betty Jo had many other injuries including numerous facial lacerations which have left scars and a fractured ankle, to name but a few.

Why did this accident occur?

ISHMAEL CORNETT'S MEDICAL HISTORY

Dr. Addams filed with his pre-trial deposition, a xerox copy of his entire office record. Dr. Addams' office record contained electroencaphalogram (EEG) reports from Veterans Hospital, Dr. Ephraim Roseman, Louisville General Hospital, Discharge Summaries and other information from Veterans Administration Hospital, Jewish Hospital, Mayo Clinic, and of course, Dr. Addams' summary of the history and treatment that he obtained from and rendered to his patient on the occasions that Mr. Cornett visited him. Just what did Dr. Addams' *own office records reveal? Dr. Addams' own office record revealed the following:*

1) On *January 2, 1956,* Dr. George P. Crump, acting chief of Neurology Service for the Veterans Administration Hospital, Louisville, Kentucky, diagnosed Cornett as being subject to *grand mal* seizures. This, of course, was fifteen (15) years before the accident (T-E, Vol. III, pp. 328-329).

2) On *April 7, 1959,* Dr. Addams treated Cornett at the Veterans Administration Hospital and diagnosed, "Focal Seizures, left temporal region", thus showing Addams' actual knowledge of seizures some twelve (12) years prior to the accident (T-E, Vol. II, pp. 259-260).

3) Dr. Addams' own notes show that as of *February 19, 1962,* Cornett was experiencing seizures once a month (T-E, Vol. II, pp. 260-261).

4) On *March 5, 1962,* Dr. Addams noted in office visit notes that Cornett had had three (3) seizures since the last visit (February 19, 1962), and in fact had one seizure while talking with Dr. Addams. The doctor described this seizure as one in which Cornett was unable to make himself understood, had a blank expression on his face and he appeared to be "in a trance". After Dr. Addams waved his hands, snapped his fingers, yelled "Ish, Ish" (the patient's name), Mr. Cornett still did not respond. This lasted for a full sixty (60) seconds. This apaprently prompted Dr. Addams to have Cornett admitted to Jewish Hospital for tests and diagnosis which he did on the following day (T-E, Vol. II, pp. 262-269).

5) As of *March 6, 1962,* Dr. Addams' notes made while Cornett was a patient in Jewish Hospital, include

the following sentence, "HE HAD A TOTAL OF SIX (6) SEIZURES IN THE PRECEDING THIRTY-SIX (36) HOUR PERIOD PRIOR TO ADMISSION." (Emphasis added.) An electroencephalogram, EEG, Plaintiff's Exhibit 20, reads: "Extremely dysrhythmic" (T-E, Vol. II, p. 276).

6) Dr. Addams received a note dated 3/28/63 from one of Louisville's most eminent neurologists, Dr. Ephraim Roseman, head of neurosurgery at Louisville School of Medicine and at Louisville General Hospital, indicating that Mr. Cornett

> "has had grand mal seizures for some time"

and that he continues with a

> "moderate dysrhythmic EEG" (Plaintiff's Exhibit 23; T-E, Vol. II, pp. 276-277).

7) As of *September 19, 1962,* Cornett was the victim of six (6) seizures per day according to Dr. Addams' notes (T-E, Vol. II, p. 270).

8) By *October 1, 1962,* less than two weeks after his last visit, Cornett had experienced at least one other seizure (T-E, Vol. II, p. 270).

9) The doctor's notes of *February 8, 1963,* contain a simple statement to the effect, "CONTINUED TO HAVE SEIZURES" (T-E, Vol. II, p. 272).

10) Once again, on *March 26, 1963,* the same "continued to have seizures" (T-E, Vol. II, pp. 272-273).

11) *September 27, 1963,*—Dr. Addams' notes reflect that Cornett was still having seizures (T-E, Vol. II, p. 273).

12) "Pt. having more seizures . . . he wants to go into hospital", *January 11, 1964* (T-E, Vol. II, p. 274).

13) During late *March* and the first of *April, 1966,* Cornett visited the Mayo Clinic for diagnosis. In a letter from the Clinic to Dr. Addams, dated *April 1, 1966,* the following sentence appears, "As you know, focal seizures of this type are notoriously difficult to treat" (T-E, Vol. III, pp. 282-283).

14) Dr. Addams' notes of *July 1, 1969,* indicate Cornett had experienced seizures at work (T-E, Vol. II, pp. 284-285).

15) Dr. Addams' own handwritten note which has the date "1966" at the top, was, according to Dr. Addams, actually made by him sometime in November of 1970. That note, Plaintiff's Exhibit 18, reveals that the patient gave a history of having

"six accidents one year ago"

and in December of 1969,

"hit a school bus" (T-E, Vol. II, p. 289).

16) Next, Dr. Addams' handwritten note dated *October 8, 1970,* less than three months prior to the fatal accident, indicates three very important factors:

a. The number of seizures have increased—"12 in the past 15 to 20 days",

b. Cornett informed Dr. Addams that he had had several recent automobile wrecks, and

c. The characteristics of the seizures had dramatically changed. The seizures were now "bad

ones." They were such "bad ones" that the seizure that he had had three weeks before visiting the doctor (three weeks prior to October 8, 1970), that he, Cornett, had "no knowledge of it" and on May 1, 1970, he had had a wreck and had "no memory for five hours" (T-E, Vol. III, pp. 417-419; and Plaintiff's Exhibit 24).

17) On the October 8, 1970, visit, Mr. Cornett's wife accompanied him to the doctor's office and asked the doctor to please take her husband's driving privileges away from him. On this occasion, Dr. Addams told Cornett that he could no longer drive (T-E, Vol. II, pp. 285-286).

18) Dr. Addams next saw Mr. Cornett on *October 14, 1970,* and then again on *October 27, 1970,* at which time Mr. Cornett told Dr. Addams that he had had two seizures within the past two weeks (T-E, Vol. II, p. 294).

19) On *January 4, 1971,* the last time Dr. Addams saw his patient, Cornett, alive, Dr. Addams, in his own hand, made the note which is filed as Plaintiff's Exhibit 19. That note shows that Cornett had had seven seizures since November 11, 1970, four (4) occurring within a 24 hour period. This was only six days prior to the fatal collision and despite that, and with full knowledge of all of the above circumstances, Dr. Addams told Cornett, on that day or sometime in very late December, 1970, that he, Cornett, could once again resume operating his automobile (T-E, Vol. II, pp. 295-296).

20) Returning to the October 8, 1970 visit, the doctor stated:

> "I think that was sort of—his wife was really concerned about these accidents, and so I think *we just sort of agreed that I would be the boss* and tell Ish that his wife was going to drive the car like that. I just, you know, more or less told him that this was what he had to do" (T-E, Vol. II, pp. 298-299).

The doctor continued to explain that office visit of October 8, 1970 as follows:

> ". . . I don't know anything about that, except that I think that she knew that he liked me and if I discussed it with him, *he would do as I suggested. And he didn't argue, because he thought it was a good idea too.* I mean, he was concerned about this anxiety and all that he had and felt differently during this period of time. He didn't feel the same because he was tense and anxious" (T-E, Vol. II, p. 299).

21) Because his patient had gone several weeks or possibly a little bit longer without a seizure, Dr. Addams told Cornett that he could once again drive. As Dr. Addams testified, "and then, January 4, 1971, he apparently had four (4) seizures since 11-30-70, all on the same day, and so then he'd been a lengthy time without them which was good, feels good otherwise except his back still hurts and he gets a low grade backache" (T-E, Vol. II, p. 297). So sometime after that day, January 4, 1971, or in late December, 1970, some four to five weeks after the November 30th office visit where he was advised by his patient that he had had

four seizures in one day and seven seizures all total since November 30, 1970, Dr. Addams told Mr. Cornett that he could once again operate an automobile. As Dr. Addams describes it

> "my memory is that we agreed that he was enough better that he could drive . . . that he was driving again and under the sanctions of myself . . " (T-E, Vol. II, p. 300 and T-E, Vol. IV, p. 478).

22) Dr. Addams testified that except for epilepsy, Cornett enjoyed excellent health—no evidence of any problem that would indicate heart attack or stroke (T-E, Vol. III, p. 303).

ISHMAEL CORNETT'S CONDITION IMMEDIATELY FOLLOWING THE ACCIDENT

The only evidence relative to Ishmael Cornett's condition *immediately* following the accident was that offered by Ronald Garrison. He was asked to describe the sequence of events that occurred following the collision. He stated:

> "A. Immediately after impact, I found myself sitting behind the wheel, and I looked to my right, and Betty was lying on the—well, half on and half off the seat with her head against the passenger's side door, and her face was just a mass of blood.
>
> And I—all I could think of was I needed help, and I opened the car door and I got out.
>
> Q. 51. And what was—was Betty Jo conscious or unconscious?
>
> A. She was unconscious.

Q. 52. Okay. At any rate when the accident initially occurred were you stunned?

A. I was momentarily stunned at the point of impact.

Q. 53. Okay. Then you looked at her and then you got out to get help?

A. Yes, sir.

Q. 54. All right. What happened next?

A. When I got out, I saw the car that had hit us was directly in front of our car, and that car was turned on its side with its bottom facing us.

Q. 55. Was that Cornett—Ishmael Cornett's car, was it?

A. Yes.

Q. 56. Okay.

A. And I went around looking for help. I went around to the other side of his car and I saw him lying there against the—the car was on its side, and he was lying next to the ground inside the car.

Q. 57. Was he conscious or unconscious?

A. He was unconscious. There was no movement, no motion.

Q. 58. No motion? Did you hear him ever say anything?

A. No, sir.

Q. 59. What did he look like?

A. *He looked strange. His face looked distorted. His eyes were pulled to one side. It was something that you couldn't forget. He looked horrible, and there was blood on his he had a bloody froth, a whitish or bloody foam coming from his mouth.*

It was just a flash type of thing you know, you don't forget. And I knew he couldn't help—or I couldn't help him, so I went back to my car.

Q. 60. Okay, did help arrive?

A. Yes, when I got back to my car, I

started to get in and a policeman was there and he took my arm and pulled me to one side, and by that time there were people there and another policeman. And they got Betty out of the car and loaded us in a cruiser" (T-E, Vol. I, pp. 112-114). (Emphasis added.)

On cross-examination, counsel for defendants, Appellees herein, did not even attempt to challenge anything that Ron Garrison related insofar as the appearance of Ishmael Cornett at the scene of the accident.

DR. SEXTON'S TESTIMONY

Dr. Robert Sexton, neurosurgeon, testified to the following:

1. A convulsion is an alteration in the normal brain rhythm and can be manifested in many ways. Grand mal seizures (convulsions) result in loss of consciousness, foaming at the mouth and other symptoms (T-E, Vol. III, pp. 377-378).

2. Psychomotor epilepsy can cause convulsions (T-E, Vol. III, p. 378).

3. Many patients that suffer from epilepsy have mixed types in which they can have psychomotor seizure at one time, grand mal seizures at another time (T-E, Vol. III, p. 378).

4. Certain types of seizures can cause a person to go into a trance. The trance causing the patient to lose contact with reality or the external world and "in psychomotor epilepsy the trance state—or loss of contact with the external world can be more complicated and can last for long periods of time," Such a trance

can last for a minute or longer (T-E, Vol. III, pp. 379-380).

5. The longer the trance lasts, the greater the danger (T-E, Vol. III, pp. 381-382).

6. Seizures can distort the patient's face and the type of seizure that would do this would be a primary motor seizure such as a grand mal or a focal seizure. In other words, both the grand mal seizure and a focal motor seizure could account for the patient's face being distorted (T-E, Vol. III, pp. 382-383).

7. A grand mal seizure would account for Cornett's eyes to be pulled to the side because this occurs with a seizure that is a result of an "irritative type focus" (T-E, Vol. III, p. 383).

8. A grand mal seizure produces a foamy secretion in the patient's mouth (T-E, Vol. III, pp. 383-384).

9. There are several types of seizures which causes a patient to be unable to remember what happened. They are:

a) a grand mal seizure;
b) a petit mal seizure;
c) a psychomotor seizure (T-E, Vol. III, p. 384).

10. Where the patient is unable to remember for a period of five (5) hours or more after the seizure then such a seizure, according to Dr. Sexton, is *"most likely to be a severe psychomotor seizure or a series of grand mal seizures"* (T-E, Vol. III, p. 385). (Emphasis added.)

11. Temporal lobe seizures are the psychomotor type and they are "notoriously difficult to control with medication" (T-E, Vol. III, p. 386).

12. All types of seizures are really epilepsy. It is all one disease and the seizures are merely descriptive of what is happening to the patient. Therefore, it is not uncommon for a patient who suffers from epilepsy to have different types of seizures (T-E, Vol. III, pp. 402-403).

13. *The more seizures the patient experiences, the more damage there is to the brain and, therefore, the patient will experience more seizures in the future* (T-E, Vol. III, p. 404). *Because of this, seizures can and often do change from minor to major seizures* (T-E, Vol. III, pp. 404-405).

STANDARD OF CARE

Dr. Addams is not a Board certified, *or even* a Board eligible neurologist or neurosurgeon (T-E, Vol. II, pp. 257-259). At the time Dr. Addams was treating Ishmael Cornett he conducted his practice in Louisville, Kentucky. Ishmael Cornett lived in Louisville. Louisville has many Board eligible and Board certified neurologists and neurosurgeons. Despite the availability of qualified experts in the field of neurological medicine, and further despite the fact that he, Dr. Addams, was unable to control Cornett's seizures, he nevertheless attempted to treat a very serious and persistent neurological illness—epilepsy.

The pleadings are quite significant. In the first sentence of Paragraph II of his amended complaint, Ron alleged that Ishmael Cornett had an illness which,

> "made it dangerous and unsafe for the said Ishmael Cornett to operate a motor vehicle upon the highways of the Commonwealth of Kentucky" (T.R., p. 8).

In his answer, Dr. Addams admits this much of Paragraph II, the actual answer to this allegation being:

> "This defendant denies all averments of the *second* sentence of Paragraph II of the plaintiff's amended complaint."

Thereafter, there is nothing in the answer which denies the first sentence of Paragraph II *thus it stands admitted.*

Was this an oversight? Appellant thinks not.

Betty Jo filed an intervening complaint (T.R., pp. 15-17) and in Paragraph IV thereof stated that Ishmael Cornett had an illness which made it

> "dangerous and unsafe for the said Ishmael Cornett to operate a motor vehicle."

The last line of that paragraph stated that Dr. Addams:

> "negligently told him (meaning Cornett) that he could so operate a motor vehicle."

In his answer (T.R., p. 18) to Betty Jo's intervening complaint, Dr. Addams stated:

> "This defendant *admits* the averments of Paragraph IV of the intervening complaint except that this defendant denies the averments of the *last line* of such Paragraph IV."

During the trial, Betty Jo introduced several medical treatise into evidence. Dr. Addams admitted that they were authoritative. These treatise are:

a) Plaintiff's Exhibit 15, the *Merck Manual*
b) Plaintiff's Exhibit 16, *Clinical Neurology*
c) Plaintiff's Exhibit 17, *Current Medical Diagnosis.*

The *Merck Manual* states,

1) 90% of all epileptics are subject to grand mal seizures.
2) Even though Phenobarbital is a good drug in the treatment of epilepsy, it can cause drowsiness.
3) That following grand mal seizures the patient sleeps and has sore muscles.
4) Patients that suffer psychomotor seizures lose contact with their environment and become confused and mentally clouded, and that this condition lasts even after the seizure passes.
5) Because of the above, the *Merk Manual* states that under no conditions the patient should be allowed to drive an automobile.

Clinical Neurology makes it clear that the patient suffering from epilepsy should not drive an automobile or work around dangerous machinery. *Current Medical Diagnosis* states that *psychomotor seizures* causes a cloudiness of consciousness and further causes amnesia. Even Dr. Addams agrees with this (T-E, Vol. III, p. 324). Like the other publications, at page 551 thereof, it is stated that patients suffering from epilepsy

should avoid hazardous occupations and should not drive motor vehicles.

In reference to grand mal epilepsy, Dr. Sexton testified that a patient should be completely free of any evidence of any seizures for a period of at least two years before they are permitted to drive an automobile (T-E, Vol. III, p. 371). With regards to the driving restriction of a patient suffering *solely* from psychomotor seizures, Dr. Sexton stated that the advice would depend upon the character of the patient's EEGs and the character of the seizures that the patient was *then* having (T-E, Vol. III, pp. 372-373).

From the time Ishmael Cornett was first seen at Veterans Administration Hospital and during the many years that he was under Dr. Addams' care, he was constantly on Phenobarbital and other drugs. These drugs were used in an effort to try and control his seizures. He was under orders to take these drugs on a daily basis. Another publication, which Dr. Addams admitted was authoritative, was the *American Medical Association Drug Evaluation* (T-E, Vol. III, p. 414). The treatise states, and Dr. Addams admitted, that Phenobarbital, after prolonged use, can become addictive. Further that drowsiness and ataxia (difficulty maintaining one's balance—unsteadiness) are side effects. In addition to the continuation of Phenobarbital, Dr. Addams, as of October 8, 1970, put Cornett on Librium. Dr. Addams admitted that Librium can produce the same side effects as Phenobarbital (T-E, Vol. III, pp. 411-413). The above mentioned treatise, *American Medical Association Drug Evaluation,* states

that Phenobarbital is both a sedative and a hypnotic. At Page 215 of the publication it states:

> "Ambulatory patients given a sedative hypnotic should be specifically warned to avoid undertaking activities which require mental alertness, judgment, physical coordination, such as driving a vehicle, or operating dangerous machinery."

Dr. Addams was forced to agree with the correctness of that statement (T-E, Vol. III, p. 414). Further, Dr. Addams was forced to agree with the statement contained in *"Current Medical Diagnosis"* that Phenobarbital,

> "may aggravate psychomotor seizures". (T-E, Vol. III, pp. 414-415).

The standard of care, e.g., advice to the patient and control over the patient's activities, as proven in this record, and as set out above, was unchallenged, uncontradicted. *Dr. Addams did not introduce any medical treatise of any nature. Dr. Addams did not call any of his colleagues, not one single medical witness, to testify in his behalf concerning any aspect of the case.*

ARGUMENT

I. The Duty Owed and the Duty Breached.

The evidence shows that for the last fifteen (15) years of his life, Ishmael Cornett had epilepsy which produced either psychomotor seizures (this Dr. Addams admits) and/or grand mal seizures. Since 90% of those who are afflicted with epilepsy have grand mal

seizures, it is only reasonable to infer that the reports that Dr. Addams had in his own office records from the Veterans Administration Hospital and additionally from Dr. Roseman, that Cornett suffered from "grand mal seizures" were accurate. Additionally, it is abundantly clear that despite constant medication, Cornett's seizures were never under control, but in fact as the years passed by, they became more frequent and more severe. To say that the evidence in this case creates that inference is actually being charitable to Dr. Addams because in fact the evidence is so strong that a presumption, almost conclusive in nature, is a more appropriate legal conclusion.

Regardless of whether Cornett's seizures were classified as grand mal or psychomotor, it is known that his EEG's were, for the most part, either extremely, severely or moderately dysrhythmic. There was never an occasion where any EEG was interpreted as normal.

Putting aside the fact of whether he did or did not have grand mal or severe psychomotor seizures in the earlier years, the medical fact remains that his seizures were uncontroled. Further, the medical fact is that the more seizures one has, the more he will in the future have. And another medical fact is clear, namely that everytime a patient has a seizure, organic damage to the brain occurs and this is the reason why more seizures follow. Lastly, and of extreme significance, is the uncontradicted medical fact that the more seizures the patient suffers, the more probable it is that the seizures will move from minor to major in character. Isn't this precisely what happened to Ishmael Cornett?

This brings us to the fateful period of time, beginning in October of 1970, when Ishmael Cornett and his wife went to Dr. Addams' office and gave him a history which should have been alarming to the doctor and should have created red flags and danger signs from one end of his office to the other. The doctor's own handwritten record shows that Cornett told him that he had had twelve (12) seizures in the past fifteen (15) to twenty (20) days, meaning that he had averaged almost a seizure every day for the past several weeks before seeing the doctor. Further that he had had several recent automobile accidents as a result of seizures and that on one occasion he had no memory of the accident at all and on the other occasion he had no memory of the wreck for some five (5) hours after it had occurred. He further told the doctor that in the previous year he had six (6) automobile accidents, one of which involved a school bus.

Once again, and being extremely charitable to Dr. Addams, this evidence establishes, at a minimum, an inference (actually a presumption) that the character of Cornett's seizures had indeed changed from the sixty (60) second trance where, for that period of time and a short time thereafter, he lost contact with his environment (a seizure which in and of itself would create extreme danger to a motorist) to seizures that were now "bad ones" meaning grand mal or extremely severe psychomotor.

Under these circumstances the medical literature and Dr. Sexton say, without hesitation or equivocation, that the patient should be forbidden to operate a motor

vehicle. Dr. Addams, when he filed his answer to Ron's amended complaint and Betty Jo's intervening complaint, admitted that Cornett had a condition which indeed made it unsafe for him to operate a motor vehicle upon the highways of this Commonwealth. The evidence in this case is uncontradicted that not only is the patient not permitted to drive, but further that he has to be seizure free for a period of two or more years before a doctor can even begin to think of allowing the patient to resume the *privilege* and the *responsibility* of operating a motor vehicle.

Did Dr. Addams wait two years before he told Cornett that he could once again resume operating a motor vehicle? No!!! Dr. Addams' office record shows that on October 27, 1970, Cornett told him that he had had two (2) seizures within the past two (2) weeks and when he saw Cornett on January 4, 1971, that Cornett gave him a history of having had seven (7) seizures since November 11, 1970 and actually had four (4) seizures within a twenty-four (24) hour period of time. Not only wasn't Cornett free of seizures for at least a two year period before Dr. Addams again told him that it would be okay to drive an automobile, he wasn't even free of seizures for two (2) months—much less the two (2) years.

Did Dr. Addams adhere to the standard of care that the evidence uncontradictably showed was required? No!!! Interestingly enough when Mrs. Cornett came to Dr. Addams' office with her husband on October 8, 1970, she, according to Dr. Addams, was so concerned about all of the accidents that her husband

was having that she asked the doctor to prohibit her husband from driving. And as Dr. Addams said in his testimony,

> "we just sort of agreed that *I would be the boss. . .*"

and further that when he told Cornett that he couldn't drive,

> ". . . *he didn't argue, because he thought it was a good idea too.*"

Dr. Addams does not offer any explanation as to why he again told Cornett that he could drive except this one statement,

> "my memory is that we agreed that he was enough better that he could drive—that he was driving again and under the sanctions of myself . . .".

Because the facts are so clear, both in the pleadings as well as in the proof, that Dr. Addams violated the standard of care required, it almost seems unnecessary to cite legal authority on the point; however, this case is so important to Betty Jo she asks the Court's indulgence in reviewing the authority cited below.

Betty Jo relies upon the following authority in support of her contention that Dr. Addams owed her, a member of the public, a dtuy which was breached. These cases are:

1. *Merchants National Bank & Trust Company of Fargo* v. *United States,* 272 F. Supp. 409 (D.N.D. 1967).
2. *Tarasoff* v. *Regents of University of California,* 118 Cal. Rept. 129, 529 P. 2d 553 (1975).

3. *First National Bank of Jacksonville* v. *City of Jacksonville,* 310 S. W. 2d 19 (Fla. 1975).

4. *Landeros* v. *Flood,* 123 Cal. Rept. 713 (1975).

5. *Homere* v. *State,* 361 N. Y. S. 2d 820 (1974).

6. *Hofmann v. Blackmon,* 241 So. 2d 752 (Fla. App. 1970).

7. *Wojcik* v. *Slumenam Company of America,* 183 N. Y. S. 2d 351 (1959).

8. *Davis* v. *Rodman,* 227 S. W. 612 (Ark. 1927).

9. *Kaiser* v. *Suburban Transportation System,* 398 P. 2d 14, (Wash. 1965) 401 P. 2d 350 (Wash. 1965).

10. *Freese v. Lemmon,* 210 N. W. 2d 576 (Iowa 1973).

11. Restatement, Second, Torts §§311, 315, 319, 320, 321 and 324a.

The Restatement, Second, Torts, §311 reads:

"§ 311. Negligent Misrepresentation Involving Risk of Physical Harm

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated."

The Restatement, Second, Torts §315 reads:

"§ 315. General Principle

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection."

The Restatement, Second, Torts §319 reads:

"§ 319. Duty of Those in Charge of Person Having Dangerous Propensities

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

The Restatement, Second, Torts §320 reads:

"§ 320. Duty of Person Having Custody of Another to Control Conduct of Third Persons

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject

him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control."

The Restatement, Second, Torts §321 reads:

"§ 321. Duty to Act When Prior Conduct is Found to be Dangerous

(1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

(2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk."

The Restatement, Second, Torts §324a reads:

"§ 324 A. Liability to Third Person for Negligent Performance of Undertaking

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm re-

sulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

In the *Homere* case, supra, a mental patient who had exhibited propensities for extreme violence had been, through order of the court, placed in a state hospital for treatment. The hospital, through its psychiatric staff, had "medically" decided that the patient could be released and allowed back into public life. The medical staff of the state institution did not report back to the court so as to permit the court to determine whether or not it agreed with the "medical" opinion. The patient, shortly after being released to the public, brutally attacked two members of the public who sued the state of New York for damages. Recovery was permitted. The holding of this case clearly shows that the doctors owed a duty to the public even though they were treating a member of the public who was not the complaining party. The doctors being agents of the state, through the principles of respondeat superior, caused liability to fall upon the state.

In *Landeros,* supra, there was a statute which required the reporting of any evidence of a child battery. The hospital failed to report injuries to a child which

apparently had been caused by force. The child was released to its parents and later was caused, at the hands of his parents, to suffer additional and permanent injury. The court held that a duty was owed, it was breached, and as a result the child was subjected to a later attack by his parents and therefore liability attached.

In the *First National Bank of Jacksonville* case, supra, the Florida court held that the city was liable for the failure of its police investigators to use appropriate procedure to protect a minor from abuse and neglect by his father when there was reason to believe that an investigation was appropriate. Although there was no statutory duty involved in this case, there was a departmental regulation which necessitated the investigation which was not conducted.

Of course it doesn't matter whether we're talking about a statute, a departmental regulation, a standard of a profession, or a common law duty.

In the *Merchants National Bank and Trust Company of Fargo* case, supra, the Veterans Administration, an agency of the United States government (the defendant) arranged for a patient to work on a local farm but failed to warn the farmer of the dangerous propensities that the workman's background suggested. The patient killed the farmer's wife. The court found the Veterans Administration liable for the wrongful death of the farmer's wife.

In *Tarasoff,* supra, the court held that a special relationship existed between a patient and his doctor which could support affirmative duties for the benefit

of third persons. In that case the defendant university operated a hospital which employed a psychologist. A student by the name of Poddar told the psychologist that he was going to kill Tatiana Tarasoff, his former girlfriend. Poddar was then picked up by the campus police but they said he appeared rational so they released him. No warning was given Tatiana Tarasoff. Poddar subsequently killed her.

In *Tarasoff,* the court stated:

> "As the present case illustrates, a patient with severe mental illness and dangerous proclivities, may, in a given case, present a danger as serious and as foreseable as does the carrier of a contagious disease or the driver *whose condition or medication affects his ability to drive safely.* We conclude that a doctor or a psychotherapist treating a mentaly ill patient, just as a doctor treating physical illness, bears a duty to use reasonable care to give threatened persons such warnings as are essential to avert foreseeable danger arising from his patient's condition or treatment." (Page 135 of the Opinion.) (Emphasis added.)

In reaching this conclusion, the court stated:

> "Although under the common law, as a general rule, one person owed no duty to control the conduct of another (Richards v. Stanley (1954) 43 Cal. 2d 60, 65, 271 P. 2d 23; Wright v. Arcade School Dist. (1964) 230 Cal. App. 2d 272, 277, 40 Cal. Rptr. 812; Rest. 2d Torts (1965) 315), nor to warn those endangered by such conduct (Rest. 2d Torts, supra, § 314, com. c; Prosser, Law of Torts (4th ed. 1971) § 56, p. 341), the courts have noted exceptions to this rule. In two classes of cases the

> courts have imposed a duty of care: (1) cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct (see Rest. 2d Torts, *supra,* §§ 315-320); and (2) cases in which the defendant has engaged, or undertaken to engage, in affirmative action to control the anticipated dangerous conduct or protect the prospective victim. (See Rest. 2d Torts, *supra,* §§ 321-324a.) *Both exceptions apply to the facts of this case.*" (Emphasis added.)

Comment A to the Restatement, second, Torts §324a makes it clear that

> "the rule stated in this Section (meaning 324a) parallels the one stated in Section 323. . . . This Section (meaning 324a) deals with the liability to third persons."

Section 323 of the Restatement of Torts 2d, while not directly applicable to the case at bar, by analogy is applicable due to the fact that it is clear that by virtue of that Section, Dr. Addams would be liable to the estate of Cornett had a claim been presented in its behalf.

In the *Wojcik* and *Davis cases,* supra, the New York and Arkansas Courts were faced with a similar problem, namely where a physician diagnosed an illness but failed to warn members of the patient's family of the dangers it presented because of the highly contagious nature of the illness. In each case a member of the family contracted the disease from his relative and brought suit against the physician. In each case, the

court held that a cause of action had been presented and that the doctor was under a duty to warn, i.e. under a duty to take affirmative action to protect members of the public (in these cases, members of the immediate family).

In the *Hofmann* case, supra, the court held that the defendant doctor was liable to persons infected by his patient if he negligently failed to diagnose a contagious disease. The facts in that case simply were that the defendant doctor's patient had tuberculosis and the defendant negligently failed to diagnose the disease and as a result the plaintiff was exposed to and contracted tuberculosis. The court held that the doctor was liable.

In the *Freese* case, supra, we find a factual situation which is identical to the case at bar. The plaintiff in that case was a pedestrian who sued a motorist and the motorist's treating physician. The motorist lost control of his automobile and struck the plaintiff. It was alleged that the motorist had epilepsy and had had previous seizures which the physician had failed to diagnose and failed to employ procedures to determine the cause of the seizures and further failed to advise his patient not to drive an automobile and/or failed to warn the patient of the dangers involved in driving an automobile and/or negligently advised his patient that he could drive an automobile. The trial court dismised the case on the pleadings and, on appeal, the Iowa court reversed and stated that a cause of action had been stated, i.e., that a duty was owed and if the plaintiff could prove what was alleged that a cause

of action would in fact exist and recovery would be allowed. Justice Uhlenhopp stated:

> "It seems to me that under their petition, plaintiffs could prove facts bringing them within Section 311(1)(b) of the Restatement of Torts 2d."

After setting out that section of the Restatement, Justice Uhlenhopp writes:

> "We also see, Comment b to that section ('Thus it is as much a part of the professional duty of a physician to give correct informaiton as to the character of the disease from which his patient is suffering, where such knowledge is necessary to the safety of the patient *or others,* as it is to make a correct diagnosis or to prescribe the appropriate medicine.')"

There is a dissent in *Freese* which, if carefully analyzed, is based upon the same philosophical consideration as evidenced by the Memorandum Opinion of the Trial Judge herein. As evidenced by the dissent, one can always find some law, no matter how old or archaic, to support a philosophical position. The logical conclusion which follows from the dissent would ultimately permit the medical profession to tell the public when and under what circumstances it, the public, should have access to the courts. If the propaganda used by the medical profession and those which insure that profession is allowed to create the atmosphere of fear on the part of the judiciary in determining the legal rights of the citizens of this Commonwealth, then the judiciary in effect is surrendering, to

the medical profession, the duties and responsibilities which are exclusively those of our courts.

In *Kaiser,* supra, the Washington court held that a physician was under a duty to warn his patient of the effects of a drug which the physician had prescribed. In *Kaiser* the patient was a bus driver and he, while operating a public bus, became very drowsy, lost conrol and had an accident. A passenger on the bus was injured. That passenger brought suit against the bus company and the driver's treating physician. The *trial court* held that the doctor was not under a duty to the passenger and dismissed the plaintiff's complaint against the physician. The *Appellate Court* reversed and said that a duty was owed.

It is clear that in the case at bar a duty was owed. Factually, it is clear, in the case at bar that the duty owed was violated. The real pivotal point of this case is whether or not the violation of the duty owed was a substantial factor in the injuries and tragic losses that Betty Jo sustained. In effect we must turn our attention to the law of causation.

II. Causation.

In sustaining Dr. Addams' Motion for Judgment Notwithstanding the Verdict, the trial court filed a Memorandum Opinion (T.R., pp. 70-71). Of course the Trial Judge anticipated that regardless of how he ruled an appeal would follow because he states:

> "This court has tried and it feels successfully, to so construct this record that regardless of the result

> on appeal a re-trial of this case will not be necessary."

This statement clearly shows that the Trial Judge had some misgivings about the correctness of his decision, namely the correctness of his analysis of the evidence. The very first paragraph of the Memorandum Opinion says,

> "There is not sufficient evidence in this record to establish why Ishmael Cornett suddenly lost control of his vehicle, crossed the median and struck plaintiff's vehicle head on. *The only evidence* at all seeking to attribute the accident to an epileptic seizure was the fact that after the accident Ishmael Cornett had some froth on his lips and his eyes were pulled to one side. . . ."

Of course, that is not the "only evidence" in this record which creates an inference or a presumption that Ishmael Cornett lost control of his vehicle due to a seizure.

Neither Dr. Addams, nor the estate of Ishmael Cornett, offered any evidence from any witness to even remotely suggest why Cornett lost control of his car. No mechanical failure was suggested. No drinking was suggested. No speed was suggested. No rain slick road was suggested. No bumblebee flying in the window and stinging Mr. Cornett in the eyeball was suggested and no other health problem was suggested. Nothing was suggested. Certainly, based upon his medical records, and the constantly increasing seizure problem that Cornett was experiencing, *an inference* arises, if no other evidence of any nature existed, that he lost

control because of a seizure. However, this inference, which is all Appellant needs to get to a jury, rises to the dignity of a presumption when viewed in light of what Ron Garrison saw a few short moments or a minute after the accident occurred. Ron Garrison observed Cornett's face and Ron Garrison will never forget what he saw as long as he lives. It is interesting to note that neither counsel for Cornett, nor counsel for Dr. Addams, ever attempted to even challenge Ron on what he saw. What did he see?

a) a distorted face
b) Cornett's eyes pulled to the side, and
c) "a bloody froth, a whitish or foamy blood coming from his mouth."

The uncontradicted medical proof by Dr. Sexton is that that description fits a typical grand mal seizure and a few of the symptoms can even suggest a severe psychomotor seizure. At this time of his life was Cornett experiencing severe psychomotor seizures and/or grand mal seizures? Dr. Addams' note of October 8, 1970 suggests that he was. He was having "bad ones." He had no memory for five (5) hours on one occasion following a seizure which led to a wreck and he had no memory at all on another occasion which also led to a wreck. And what did Dr. Sexton say that meant—no memory or no memory for five hours? *He categorically says this means a severe psychomotor seizure or a series of grand mal seizures.* Dr. Sexton's testimony on this point is uncontradicted. In fact Dr. Sexton's testimony on all points is uncontradicted. In truth, it is uncontradictable.

It is indeed strange that not one single doctor came into court and testified in behalf of Dr. Addams on any of the issues in this case—not one single colleague.

It is equally significant that not one single medical treatise was produced by Dr. Addams that would even suggest Dr. Addams was practicing good medicine or at least acceptable medicine in telling Cornett that he could again drive an automobile, or that what Ron saw on Cornett's face was not suggestive of a seizure.

It is Appellant's belief that Paragraph two (2) of the Memorandum Opinion is the real reason that the Judgment Notwithstanding the Verdict was entered and that Paragraph one (1) of the Memorandum Opinion was the only legal reason that could possibly be advanced to support the Trial Judge's philosophical position.

If it is "reasonably probable" that a fact exists then the burden of causation has been met.

> ". . . the plaintiff need not establish a case beyond reasonable doubt." (*Miller* v. *Watts,* Ky., 436 S. W. 2d 515 [1969].)

What constitutes sufficient circumstantial evidence to permit the court to submit the case to the jury? In speaking for a unanimous court in *Holbrook* v. *Rose,* Ky., 458 S. W. 2d 155 (1970), Justice Reed, at pages 157-158 wrote:

> ". . . legal causation may be established by a quantum of circumstantial evidence from which a jury may reasonably *infer* that the product was a legal cause of harm." (Emphasis added.)

Again the court in *Bartley* v. *Childers,* Ky., 433 S. W. 2d 130 (1958) made it clear that all that a plaintiff had to do was to "tilt the balance from possibility to probability." As the court stated, in citing from a law review article, the test in the area of medical causation really is what is "more likely than not." In *Bartley,* the plaintiff's decedent was found at the bottom of a pool. Death was presumed to be from drowning. The negligence involved was the failure to have proper life guards to supervise the swimmers. After getting over the hurdle of whether or not a duty was owed by the defendant to provide life guards, the issue as to whether or not the plaintiff's decedent died from a cause other than drowning, was disposed of by the inference that the overall proof established—"what was more likely than not." When we view this test in light of the known facts in the case at bar, it becomes apparent that Betty Jo has shouldered the burden of proof required. Dr. Addams offered no explanation of any nature as to why Cornett went out of control, but the record is clear that he was constantly suffering from serious epileptic seizures and having many accidents. This certainly creates an inference and moves the case out of the realm of speculation, "tilting the balance" to what is probable—"what is more likely than not." Coupling this with what Ron observed about Cornett's facial features following the accident and coupling that with the medical evidence of Dr. Sexton as to the meaning of what Ron observed, it becomes obvious that a case more than by inference has been established, and in fact the circumstantial evidence presented, has

created a presumption that Cornett had a seizure on the occasion in question. This is a case that if anyone was entitled to a directed verdict on the issue of causation, Betty Jo was.

What is the line separating speculative proof and circumstantial or inferential proof? In *Beatrice Foods Company* v. *Chathem,* Ky., 371 S. W. 2d 17 (1966), the court, in a well reasoned opinion, stated:

> "But the line between what is speculative proof and what is circumstantial or inferential proof is sometimes dim and uncertain. The jury is instructed to reach its verdict from the evidence; and if there is competent and relevant evidence affording a reasonable and logical inference or conclusion of a definite fact, this court will not invade the Jury's province to weigh conflicting evidence, judge the credibility of witnesses and draw the ultimate conclusion."

While the *Beatrice* case involved the destruction of a building by fire, the similarities between that case and the one at bar are remarkable:

Beatrice Foods	Case at Bar
1. The area in which the fire started (a refrigerating plant serving a drug store), had a history of electrical malfunctions, including *frequent* "blow-outs" of a 100 ampere fuse, *AND* at least one prior fire some eight days before the fire which destroyed the building.	1. Ishmael Cornett had a history of epileptic seizures and at least three prior auto accidents in a fairly recent time period.

Beatrice Foods	Case at Bar
2. A mechanic/service man was called in to investigate and repair the compressor motor which it was felt, at the time, was the cause of the first fire.	2. Dr. Addams was consulted to remedy the seizure problem as well as was medically feasible. This the doctor undertook to do.
3. The building involved here was destroyed by yet another fire, and there was extensive circumstantial evidence that the fire originated in that same compressor motor mentioned earlier.	3. Ishmael Cornett died in yet another automobile accident and there was extensive circumstantial evidence that he had suffered a seizure while driving.
4. There are no eye witnesses to testify directly as to how the fire began.	4. There was an eye-witness to testify *directly* that Ishmael Cornett suffered a seizure.
5. The Jury found that there was sufficient circumstantantial evidence put forth to warrant a finding of both negligence and proximate cause.	5. The Jury found that there was sufficient circumstantial evidence put forth to warrant a finding of both negligence and proximate cause.
6. The Jury found for the Plaintiff.	6. The Jury found for the Plaintiff.

The case of *Schuster* v. *Stedley,* Ky., 406 S. W. 2d 387 (1966), involved an action by an injured bystander agianst the owner of a rifle to recover for the loss of vision in one eye. The injury was sustained when the rifle's breach bolt blew off during firing. The central issue at trial was what caused the breach bolt to fly off. Experts, on both sides of this question, took the stand to declare what the possible causes *could have*

been. At the conclusion of the testimony the jury was instructed and returned a verdict which said that the owner of the rifle was negligent in his method of loading the ammunition which was fired in the rifle. On appeal it was contended that:

> "under the state of the evidence, the jury was required to speculate in arriving at the cause or causes of the accident."

In upholding the jury's verdict, this Court held,

> "Unquestionably the trial was a field day for the experts. All of them suggested possible causes, some more likely than others, but most of them had opinions as to what was probable. The mere fact that these opinions were divergent, reflecting the positions of the respective litigants for whom they were appearing, does not necessarily mean that a choice as to which one to believe was speculative."

In the case at bar, neither Cornett or Addams suggested any other reasons why Cornett lost control of the car. In the case at bar there is no divergent evidence as to cause. In *Schuster,* the court said:

> "The kind of speculation that is not allowed occurs when the probabilities of an event having happened in one or two or more ways are *equal* and there is *no evidence* as to which way it happened." (Empahis added)

This is a two-pronged test, and the Appellee, Addams, has not met either of them.

To begin with, it must be shown that the probabilities are equal. This, clearly Dr. Addams failed to do

by virtue of his failure to put on any proof as to any theories as to what caused the accident. Secondly, there is a requirement that there be no evidence as to which way it happened. The facts put forth at trial on behalf of Betty Jo provide more than ample evidence from which the jury could, and in fact did, find that Ishmael suffered a seizure which caused the accident.

Causation is always a factual situation and it is respectfully contended that Appellant, Betty Jo Garrison, presented sufficient facts to create a jury issue. The trial court erred in granting Dr. Addams a Judgment Notwithstanding the Verdict.

CONCLUSION

The Appellant, Betty Jo Garrison, was catastrophically and permanently injured as a result of the accident giving rise to this litigation. The record shows that the medical expenses that she incurred greatly exceeded the small settlement that she was able to achieve with State Farm Mutual. The jury's verdict, despite the fact that it was in excess of $140,000.00, was modest when compared with the permanent losses and tragedy that befell Betty Jo. The record shows that that same jury, at the time that it awarded Betty Jo her verdict, awarded Ron Garrison $800.00 for his injuries (also $400 odd dollars for his medical expenses) despite the fact that his injuries were multiple, serious, and some of them permanent. The jury, unamiously, found that Dr. Addams was responsible. This was a conservative jury and its verdict was not one based on

sympathy but one based upon cold, hard evidence. The evidence in this case amply establishes that Dr. Addams owed a duty to Cornett and because of Cornett's condition, he owed a duty to the public. The proof further amply shows that he breached his duty to Cornett when he again told him he could drive an automobile and thus he breached his duty to the public. The evidence further amply shows that it is "more likely than not" that Cornett had a seizure which caused him to lose control of his car.

It is therefore Appellant's contention that the trial court erred in granting Dr. Addams a Judgment Notwithstanding the Verdict. Appellant requests the Court to reverse and to enter an order whereby the judgment heretofore entered in her behalf is reinstated.

Respectfully submitted,

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